No. [redacted] 2

IN THE

Supreme Court of the United States

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OCTOBER TERM, 1943.

IN THE MATTER

of

ENGINEERS PUBLIC SERVICE COMPANY AND ITS SUBSIDIARY COMPANIES.

ENGINEERS PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY (a Delaware corporation), VIRGINIA ELECTRIC AND POWER COMPANY, SAVANNAH ELECTRIC AND POWER COMPANY, GULF STATES UTILITIES COMPANY, EL PASO ELECTRIC COMPANY (a Texas corporation), and ENGINEERS PUBLIC SERVICE COMPANY, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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January 27, 1944.

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Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered November 22, 1943, reversing an order of the Securities and Exchange Commission (herein called the Commission), dated September 16, 1942, which

directed petitioners Engineers Public Service Company and El Paso Electric Company (Del.) to divest themselves of all interest in certain subsidiary corporations (R. 159-162), and a further order, dated October 6, 1943, which denied a petition for rehearing and for leave to adduce additional evidence (R. 163-165).[1] Although the judgment reversed said orders and remanded the proceedings, the opinion of the court below was adverse to petitioners on the major issues.

Opinions Below.

The Opinion (R. 78-158) and Order (R. 159-162) of the Commission dated September 16, 1942 (R. 159-162), and its Opinion and Order dated October 6, 1942 (R. 163-165), issued, respectively, as Holding Company Act Releases No. 3796 and 3835, are not yet reported. The opinion of the Court of Appeals (R. 1209-1231) is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered November 22, 1943 (R. 1233). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, which is made applicable by Section 24(a) of the Public Utility Holding Company Act of 1935.

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[1] On January 8, 1944, the Solicitor General, on behalf of the Commission, filed a petition for a writ of certiorari (No. 587, present term) to review those portions of the judgment which are adverse to the Commission. Petitioners, in the present petition, rely upon the printed record filed by the Solicitor General in No. 587, and all record references herein are to said printed record.

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Statute Involved.

The issues involve the validity and interpretation of Section 11(b)(1) of the Public Utility Holding Company Act of 1935 (herein called the Act), being Title I of the Public Utility Act of 1935 (15 U. S. C. A. § 79k (b)(1)), the pertinent provisions of which are set forth in the Appendix, pp. 23-24, *infra*.

In essence, Section 11(b)(1) makes it the duty of the Commission to require each registered holding company to take such action as the Commission finds necessary to limit the operations of its holding-company system to a single "integrated public-utility system", as that term is defined in Section 2(a)(29) of the Act, together with such additional integrated public-utility systems and such other businesses as meet the standards specified in Section 11(b)(1).

Questions Presented.

1. Whether Section 11(b)(1) is a proper exercise of the Congressional power to regulate commerce among the several States.

2. Whether Section 11(b)(1) violates the due process clause of the Fifth Amendment.

3. Whether the Commission should have admitted evidence offered by petitioners to establish that the provisions of Section 11(b)(1) of the Act are arbitrary and unreasonable, and therefore unconstitutional, in that they have no real or substantial relation to the purposes of the Act.

4. Whether clause (B) of Section 11(b)(1) requires that all integrated public-utility systems controlled by one

holding company (including its "single" system) shall be located in one geographical area.

5. Whether the phrase "substantial economies" in Clause (A) of Section 11(b)(1) requires something more than proof of substantial savings in operational expenses resulting from retention of control by the holding company.

Statement.

The petitioners Engineers Public Service Company, a Delaware corporation (herein called Engineers), and its subsidiary, El Paso Electric Company, a Delaware corporation (herein called El Paso Delaware), are engaged solely in the business of owning and holding shares of stock and other securities of public utility and other corporations, financially assisting their respective subsidiaries, and carrying on activities incidental thereto. Both companies registered under the Act, reserving their constitutional rights,[2] and each is thus a "registered holding company" (R. 51-52, 167-168, 1209-1210).

The petitioners Virginia Electric and Power Company (herein called Virginia), Savannah Electric and Power Company (herein called Savannah), and Gulf States Utilities Company (herein called Gulf States), are operating subsidiaries of Engineers. The petitioner El Paso Electric Company, a Texas corporation (herein called El Paso Texas), is an operating subsidiary of El Paso Delaware. The petitioner Engineers Public Service Company, Inc. (herein called Engineers, Inc.) is a mutual service company duly qualified under Section 13 of the Act, the stock of

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[2] See *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419, 435 (1938).

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which is owned by subsidiaries of Engineers (R. 51-53, 167-174, 1209-1210).

Disregarding companies and properties dealt with in prior orders of the Commission, not here in question, the following table shows each company in the holding company system of Engineers, including the holding company system of El Paso Delaware, the nature of the business in which each such company is engaged, and the area in which each such company operates (R. 53, 83, 155, 167-168, 291, 1209-1210):[2]

Name of Company	Character of Business	State or Country in Which Engaged in Business
Engineers	Holding Company	.....
El Paso Delaware	Holding Company	.....
El Paso Texas	Electric utility, electric merchandising and jobbing	Texas and New Mexico
Virginia	Electric utility, gas utility, electric and gas merchandising and jobbing, street railway, bus and ice	Virginia and North Carolina
Savannah	Electric utility, electric merchandising and jobbing, street railway, and bus	Georgia
Gulf States	Electric utility, gas utility, electric and gas merchandising and jobbing, ice, water, and steam	Texas and Louisiana
Engineers, Inc.	Mutual service company rendering services to companies in the Engineers' system	New York

[2] At the time of the entry of the divestment order of September 16, 1943, Engineers also owned Baton Rouge Bus Company, Inc., which operates a bus business in Louisiana, and held a minority stock interest in El Paso Natural Gas Company; and El Paso Delaware owned El Paso and Juarez Traction Company, which operates a street railway and toll bridge in Mexico (R. 150, 167-168, 1209-1210). Since said date, Engineers has sold Baton Rouge Bus Company, Inc., and El Paso Delaware has sold El Paso and Juarez Traction Company.

Recently, El Paso Texas sold the street railway, bus and toll bridge businesses which it operated (in addition to its electric utility and jobbing businesses) at the time of the entry of said order.

By notice and order dated February 28, 1940, the Commission instituted the present proceedings, to determine what action is necessary in order that the holding company system of Engineers shall so limit its operations as to comply with Section 11(b)(1) of the Act (R. 156, 166-180).

Petitioners filed a motion to dismiss the proceeding (R. 156, 181-187), which was construed by the Commission as a request for a statement of its "tentative conclusions" (R. 156, 188-189). Petitioners also filed an answer challenging the validity of the Act and setting forth certain defenses (R. 156, 191-229). On March 11, 1941, the Commission issued its "tentative conclusions" (R. 230-237).

Hearings were commenced before an Examiner on April 22, 1941, and closed on November 4, 1941 (R. 362-772). At these hearings petitioners offered evidence, prepared in large part from heretofore unpublished material in the files of the Commission and the Federal Power Commission, to prove that the provisions of Section 11 (b) (1) have no real or substantial relation to the purposes of the Act (R. 248-251, 893-1140). This evidence was excluded by the Commission on the ground that it was without authority to pass upon the constitutionality of the Act (R. 163-164, 248-252, 289).

On September 16, 1942, the Commission entered an order (R. 159-162) directing that, within one year,

> (1) Engineers should dispose of all its assets other than securities of Virginia (i.e., all its interest in Savannah, Gulf States, El Paso Delaware, El Paso Texas, Baton Rouge Bus Company, El Paso and Juarez Traction Company, El Paso Natural Gas Company, and Engineers, Inc.), and should cease to own properties owned or operated by it through Virginia for the purpose of conducting any gas utility, gas appliance merchandising and jobbing, and transportation businesses; and

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> (2) El Paso Delaware should dispose of its interest in El Paso and Juarez Traction Company, and cease to own or operate any facilities owned or operated by it through El Paso Texas for the purpose of conducting any transportation or toll bridge business.[4]

Said order purported to give Engineers the right, within fifteen days, to petition for leave to retain as its single system, in lieu of Virginia, the electric-utility system of Gulf States (which could be done, of course, only if such leave were granted by the Commission).

It will be noted that the effect of said order was to require Engineers to divest itself of all its properties other than Virginia and to cease carrying on all its other businesses except the electric merchandising and jobbing business related to Virginia's electric utility business, and a small ice business carried on by Virginia (R. 1209-1211). The assets of which Engineers was thus required to divest itself were carried on its books, as of December 31, 1940, at a value in excess of $30,000,000 (R. 253).

Thereafter, petitioners filed a petition for rehearing and for leave to adduce additional evidence (R. 298-310). On October 6, 1942, the Commission entered an order denying said petition, but modifying the order of September 16, 1942 so as to give Engineers an additional fifteen days in which to petition for leave to retain Gulf States as its single system (R. 163-165). No such petition was filed by Engineers.[5]

On November 22, 1943, upon a petition to review pursuant to Section 24(a) of the Act, the Court of Appeals for

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[4] See footnote 3, page 5, *supra*.

[5] Previously, on July 23, 1941, and December 29, 1941, the Commission entered orders requiring Engineers to divest itself of its interests in certain companies not here involved (R. 81, 157, 295-297). No issues are here presented with respect to said orders.

the District of Columbia entered its judgment reversing said orders and remanding the cause to the Commission for further proceedings in accordance with the court's opinion (R. 1233). By its opinion said court

(1) upheld the constitutionality of Section 11(b)(1) of the Act (R. 1229);

(2) sustained the Commission's refusal to admit evidence offered by petitioners to show that Section 11(b)(1) is arbitrary and unreasonable (R. 1229-1231);

(3) adopted the Commission's so-called "one area" interpretation of clause (B) of Section 11(b)(1), under which all integrated public utility systems controlled by one holding company, including its single system, are required to be located in one geographical area (R. 1214-1216), and under which, for example, Engineers was held to be entitled to continue to control *either* the Virginia utility system or the Gulf States utility system, but not *both* (R. 257-276);

(4) adopted, with one judge dissenting, the Commission's interpretation of the phrase "substantial economies" in clause (A) of Section 11(b)(1) which, for example, precluded Virginia from continuing to operate its gas system in connection with its electric system (R. 1217-1220);

(5) rejected the Commission's interpretation of the "other business" clauses of Section 11(b)(1), which, for example, required Virginia to cease to operate its street railway system and its gas appliance business (R. 1221-1226); and

(6) rejected the Commission's holding that it could select for Engineers the single integrated public-utility system which it might retain (R. 1227-1229).

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On January 8, 1944, the Solicitor General filed a petition, on behalf of the Commission, for a writ of certiorari (No. 587, present term) to review those portions of the decision of the court below which are adverse to the Commission (see footnote 1, p. 2, *supra*).

In view of the public importance of the issues, petitioners do not oppose the granting of the writ sought by the Solicitor General.[6]

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the Commission properly refused to admit evidence offered by petitioners to establish that the provisions of Section 11(b)(1) of the Act are arbitrary and unreasonable.

2. In holding that Section 11(b)(1) is within the power of Congress to regulate commerce among the several States.

3. In holding that Section 11(b)(1) does not violate the due process clause of the Fifth Amendment.

4. In holding that clause (B) of Section 11(b)(1) requires that all integrated public-utility systems controlled by one holding company (including its single system) be located in one geographical area.

5. In holding that the phrase "substantial economies" in clause (A) of Section 11(b)(1) requires something more than proof of substantial savings in operational expense resulting from retention of control by the holding company.

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[6] Petitioners do, however, challenge the statement, at page 6 of the Solicitor General's petition in case No. 587, present term, that "There are no factual disputes."

6. In holding that there is substantial evidence to support the Commission's order with respect to divestment of the Virginia gas system, the Virginia transportation system, and the Gulf States gas system and water business.

Reasons for Granting the Writ.

1. This Case Presents Federal Questions of Great Importance Which Have Not Been, but Should Be, Settled by This Court.

(a) Questions as to the Constitutionality of Section 11(b)(1).

The Commission's orders, which in their chief aspects have been sustained by the court below, will require petitioners Engineers and El Paso Delaware to divest themselves of major portions of their respective assets, amounting to many millions of dollars, which were lawfully acquired by them prior to the passage of the Act and which have been held by them for many years in full compliance with all applicable State and other laws. Said orders will necessarily require the severance of long-established and mutually beneficial business relationships between said petitioners and their subsidiaries. As thus interpreted and upheld, Section 11(b)(1) will require numerous public-utility holding companies throughout the nation to divest themselves of large holdings of securities, with resultant hardship to many thousands of stockholders of such holding companies and their respective subsidiaries. The question as to the validity of such novel and far-reaching legislation presents an issue of great public importance which should be reviewed by this Court.

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As stated in *Landis* v. *North American Co.*, 299 U. S. 248, 256 (1936), cases arising under the Act involve issues which are "great in their complexity" and "significance" and raise "novel problems of far-reaching importance to the parties and to the public".

In a prior case involving the constitutionality of Sections 4(a) and 5 of the Act, the registration provisions, this Court expressly reserved decision upon the validity of other provisions of the Act, including Section 11(b)(1). *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419, 434-435, 439, (1938). In that case, this Court said (pp. 434-435):

> "It is evident that the provisions of §§ 4(a) and 5 are not so interwoven with the other provisions of the Act that there is any inherent or practical difficulty in the separation and independent enforcement of the former while reserving all questions as to the validity of the latter. * * * "

On March 1, 1943, this Court granted certiorari in *North American Co.* v. *Securities and Exchange Commission*, 133 F. (2d) 148 (C. C. A. 2d, 1943). The petition for the writ in that case (No. 6, present term) presents basically the same issues as questions 1 and 2, page 3, *supra*. On October 18, 1943, the Court ordered said case placed on a special docket because of the absence of a quorum as the result of four justices disqualifying themselves from participating in the decision thereof. The Court's inability to consider the *North American Company* case furnishes additional reason for granting certiorari in the case at bar.

(b) Questions as to the Interpretation of Clauses (A) and (B) of Section 11(b)(1).

Under Section 11(b)(1) the Commission must permit a holding company to continue to control one or more inte-

grated public-utility systems, in addition to its single system, if it finds that (p. 23, *infra*):

> "(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> (B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and
>
> (C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation."

The case at bar presents questions as to the interpretation of the foregoing clauses which are of great importance not only to petitioners and their stockholders but to numerous other holding-company systems and their stockholders and to the public at large.

Thus, petitioners contend that the electric utility systems of Virginia and Gulf States severally constitute integrated public-utility systems within the meaning of the Act (as found by the Commission; R. 256), and that, under clauses (A), (B) and (C) above, Engineers may continue to control *both* said systems. The court below, however, adopted the Commission's so-called "one area" interpretation of clause (B), under which all the "additional" integrated public-utility systems under the control of any holding company must be located in the same State as the single system (or in States adjoining said State or in a foreign country contiguous thereto),—this being done in face

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of the fact that the plain language of clause (B) requires only that the "additional" systems be located "in one State, or in adjoining States, or in a contiguous foreign country," *without any reference to the location of the single system.* The court below conceded that this "matter is not free from doubt" (R. 1215) and that the "one area" interpretation of clause (B) requires that clause to be construed as if it read "(B) All of such additional systems are located in a State *in which the single integrated public utility system operates,* or in States adjoining such a State, or in a foreign country contiguous thereto." Because of the construction thus placed on clause (B), which petitioners believe to be contrary not only to the language of the Act but its legislative history, the Commission ruled that Engineers could continue to control either the Virginia system or the Gulf States system, *but not both* (R. 81, 120, 257-276); and it refused to consider whether Engineers is entitled to continue to control *both* systems under clauses (A) and (C).

Again, petitioners contend that under clause (A) Virginia is entitled to continue to own and operate its gas system (held by the Commission to be a separate "integrated public-utility system") because its continued operation of said gas system in connection with its electric system (all as part of the holding-company system of Engineers) produces substantial savings in operational expenses. The Commission held, however, that substantial savings in operational expenses do not alone constitute "substantial economies" within the meaning of clause (A), and that said clause does not permit the retention of additional systems "unless there is clear and convincing evidence of loss of economies which would seriously impair the effective operations of the systems involved" (R. 1218-1219); and it ruled,

in effect, that Virginia should divest itself of its gas system (R. 160). The court below adopted the Commission's interpretation of clause (A), but one of the three judges dissented, pointing out (R. 1219) that:

> "If the terms of paragraph (A) are given normal meaning and weight, it is hard to understand why substantial savings in operational expenses do not amount to the 'substantial economies' upon which the application of the paragraph depends."

In the Solicitor General's memorandum on behalf of the Commission joining in the petition for a writ of certiorari in the *North American Company* case (No. 6, present term), it is stated (p. 3) that "The Commission has pending before it more than twenty proceedings involving the application of Section 11(b)(1) of the Act * * *." A similar statement appears in the Solicitor General's petition for a writ of certiorari (p. 11) in the case at bar (No. 587, present term). Petitioners believe that nearly every one of these proceedings raises one or both of the above-mentioned questions as to the proper interpretation of clauses (A) and (B). In view of the complexity and public importance of these questions, they should be passed upon by this Court.

(c) Questions as to the Admissibility of Evidence Bearing on the Constitutionality of the Act.

While recognizing petitioners' "well established right" (at some other time and in some other manner not specified) "to test the constitutionality of the statute by showing that it is completely lacking in factual basis" (R. 1231), the court below held that evidence bearing on the validity of the Act was not admissible before the Commission on the ground that the Commission is without authority to pass on such issue. The court below thus enunciated a novel and

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far-reaching doctrine, seemingly in conflict with the authorities (see pp. 19-20, *infra*).

Under the Act (Sec. 24a; 15 U. S. C. A., Sec. 79 x (a)) a proceeding under Section 11 (b)(1) can only come before a Circuit Court of Appeals for review of an order of the Commission upon the record made before the Commission. The structure of the Act thus indicates that all relevant evidence should be presented to and received by the Commission. Moreover, because of the weight attributed to the factual findings of administrative tribunals, it would seem logical and desirable that evidence bearing upon constitutional issues should be presented to and passed upon by the administrative tribunal in question in the same manner as other evidence. In view of the ever-increasing number of such tribunals and the frequency of attacks upon the constitutionality of legislation which they are required to administer, the Commission's right to receive and make findings with respect to the proffered evidence in the case at bar (whether or not it has power to pass upon the constitutionality of the Act) presents a question of general importance which should be reviewed by this Court. See, Note, "Introduction Before Agencies of Evidence Bearing on Constitutional Issues", Pike and Fischer, Administrative Law, Current Text, §45a. 22; and also, Note, "The Presentation of Facts Underlying the Constitutionality of Statutes", 49 Harv. Law Rev. 631 (1936).

A review of this issue in a case arising in the Court of Appeals for the District of Columbia is of unusual importance because, under Section 24(a) of the Act (15 U. S. C. A. §79 x (a)), *any* proceeding to set aside an order of the Commission may be brought in the District of Columbia as well as in the circuit wherein the aggrieved person resides or has his principal place of business.

2. The Decision of the Court Below Does Not Give Proper Effect to Applicable Decisions of This Court.

(a) Decisions of this Court dealing with the Congressional power to regulate commerce.

The only assets of which petitioners Engineers and El Paso Delaware are required to divest themselves by the challenged orders are securities of other corporations (R. 159-162).

The mere ownership of securities does not in itself constitute engaging in interstate commerce and hence is not subject to regulation under the Federal commerce power unless such ownership is found by Congress, the Commission, or the court to so affect interstate commerce that its control is necessary for the protection of such commerce. *United States* v. *Darby*, 312 U. S. 100, 118 (1941); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942).

There is nothing in the Act which makes an effect upon interstate commerce of ownership of securities by a holding company a condition to the application of Section 11(b)(1), or which requires the Commission to make any finding with respect to the effect upon interstate commerce of any such ownership. In the case at bar, neither the Commission nor the court below made any finding with respect to the effect upon interstate commerce of ownership of the securities of which petitioners Engineers and El Paso Delaware were ordered to divest themselves.

So far as can be determined by references in the opinion to decisions in other cases (R. 1229), the court below upheld the constitutionality of Section 11(b)(1) on the ground that Congress itself had made the necessary findings. But declarations in the Act (see Section 1; 15 U. S. C. A. §79a) to the effect that public-utility holding companies are "af-

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fected" with a national public interest and that their practices "*often* materially affect * * * interstate commerce" are not equivalent to a finding that interstate commerce is affected merely by holding company ownership of securities in other corporations.

Within the principle of the decisions of the Court above cited, petitioners contend that if the Commission's orders in the case at bar are to be sustained under the commerce powers, the Congressional declarations in the Act (which, at the best, amount only to a finding that certain unspecified activities of *some* holding companies affect interstate commerce) will have to be supplemented by an administrative finding that petitioners' ownership of securities of other corporations substantially affects interstate commerce.

Apart from the foregoing, Section 11(b)(1) is not a proper exercise of Congressional power under the commerce clause because, as shown hereinafter (pp. 18-19, *infra*), its provisions do not bear any reasonable relationship to the achievement of the statutory objectives,—a requirement which exists not only under the due process clause but under the commerce clause. See *Railroad Retirement Board* v. *Alton R. R. Co.*, 295 U. S. 330, 347-348, 362 (1935); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942).

(b) Decisions of this Court under the due process clause of the Fifth Amendment.

The fundamental requirement of the due process clause is "that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Railroad Retirement Board* v. *Alton R. R. Co.*, 295 U. S. 330, 347-348 (1936), *supra*. Such reasonableness is to be

tested in the light of the facts as they exist at the time of the attempted enforcement of the statute. *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U. S. 405, 415 (1935); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153 (1938).

In the case at bar, petitioners offered evidence before the Commission to establish that none of the remedial devices of Section 11(b)(1) has any real or substantial relationship to any of the purposes sought to be accomplished by the Act (R. 248-251, 893-1140). If the Commission and the court below had received and considered such evidence, it is believed that they would have been required to find, as a fact, that the provisions of Section 11(b)(1) are wholly arbitrary and unreasonable, and therefore in violation of the due process clause.

But apart from the proffered evidence, the decision of the court below fails to give proper effect to decisions of this Court holding that the due process clause is violated by legislation which imposes unnecessarily severe and restrictive regulatory or prohibitory conditions in situations where less severe and restrictive legislation will sufficiently meet the statutory objectives. See, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922); *New State Ice Co.* v. *Liebmann*, 285 U. S. 262 (1932); *Burns Baking Co.* v. *Bryan*, 264 U. S. 504 (1924); *Wolff Packing Co.* v. *Industrial Court of Kansas*, 262 U. S. 522 (1923); *Louisville Bank* v. *Radford*, 295 U. S. 555, 589, 601-602 (1935).

By the Act Congress chose as the means for eliminating the alleged "abuses" not only divestment of assets under Section 11(b)(1) but a vast host of regulatory provisions in other sections of the Act. An analysis of the Act shows that said other regulatory provisions (see, for example, Sections 5, 6, 7, 10, 11(b)(2), 12, 13, 14, 15, and 22 thereof) render wholly unnecessary, for the accomplishment of the

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statutory purposes, the severe and restrictive provisions of Section 11(b)(1). See *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 113-114 (1928), and *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 414-415 (1926). Petitioners therefore contend, under the doctrine of the cases cited, that Section 11(b)(1) is invalid because enforcement thereof would deprive them of large properties and important rights without conferring upon them any compensatory benefit and without making any substantial contribution to the statutory purposes.

Petitioners further contend, upon the authority of *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413 (1915), that procedurally Section 11(b)(1) violates the due process clause in that the Act contains no provision, in a divestment proceeding under said Section, for notice to the holders of securities of the holding company and its subsidiaries or for the participation of such security holders in such proceeding.

(c) Decisions dealing with the review by administrative agencies of evidence with respect to constitutional issues.

In holding that the Commission properly refused to admit evidence designed to show that Section 11(b)(1) is without constitutional basis, the decision of the court below appears to be in conflict with the rule enunciated in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 489 (1917), in which case this Court indicated that constitutional evidence should, in the first instance, be presented to the particular administrative tribunal involved. In that case this Court stated (p. 489) that even though a constitutional determination by an administrative agency is not conclusive, "Nevertheless, correct practice requires that, in ordinary cases, and where the opportunity is open, all the pertinent evidence shall be submitted in the first instance

to the Commission." See also *Lawrence* v. *St. Louis-San Francisco Ry.*, 274 U. S. 588, 592, 593 (1927).

The practice of other administrative tribunals appears to be contrary to that of the Commission and to conform to the "salutory principle that the essential facts should be determined before passing upon grave constitutional questions." *Polk Company* v. *Glover*, 305 U. S. 5, 10 (1938). Thus, the Board of Tax Appeals (before it was made the Tax Court), one of the oldest federal administrative bodies (*Old Colony Trust Co.* v. *Com. of Internal Revenue*, 279 U. S. 716, 725 (1929)), has expressly held that it possessed, and frequently exercised, the power to consider evidence with respect to, and to pass upon, constitutional issues. See, *Independent Life Insurance Company of America* v. *Commissioner of Internal Revenue*, 17 B. T. A. 757, 765 (1929); *American Security & Trust Co.* v. *Commissioner of Internal Revenue*, 24 B. T. A. 334, 341 (1931); *Lord Forres.* v. *Commissioner of Internal Revenue*, 25 B. T. A. 154 (1932); *O'Shaughnessy* v. *Commissioner of Internal Revenue*, 21 B. T. A. 1046 (1930). And the National Labor Relations Board has received evidence bearing on constitutional issues going far beyond the problem of mere statutory jurisdiction. *National Labor Relations Board* v. *Associated Press*, 85 F. (2d) 56, 57, 61 (C. C. A. 2d, 1936). *Cf. Labor Board* v. *Jones & Laughlin*, 301 U. S. 1 (1937); *Washington, Virginia & Maryland Coach Co.* v. *N. L. R. B.*, 301 U. S. 142 (1937); *Labor Board* v. *Clothing Co.*, 301 U. S. 58 (1937).

In upholding the Commission's action, the court below relied largely upon its own decision in *Panitz* v. *District of Columbia*, 112 F. (2d) 39 (1940), but the only point actually decided in that case was that the doctrine of exhaustion of administrative remedies does not *require* a challenge of the constitutionality of the tax before the assessor as

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a condition precedent to an action in a District Court attacking the statute as unconstitutional.

3. The Decision of the Court Below Is in Conflict with a Decision of the Circuit Court of Appeals for the Fourth Circuit.

Without discussing petitioners' constitutional objections, the court below sustained the constitutionality of Section 11(b)(1) on the basis of its prior decision in *Central & S. West Utilities Co.* v. *Securities & E. Com'n*, 136 F. (2d) 273, 275 (1943), which, in turn, was predicated upon *North American Co.* v. *Securities and Exchange Com'n*, 133 F. (2d) 148 (C. C. A. 2d, 1943), now pending on certiorari in this Court, No. 6, present term, and *Commonwealth & Southern Corp.* v. *Securities and Exch. Com'n*, 134 F. (2d) 747 (C. C. A. 3d, 1943). Under the opinion of the Circuit Court of Appeals for the Second Circuit in the *North American Company* case, Section 11(b)(1) is applicable to all registered holding companies which have not been exempted under Section 3(a) of the Act. In this respect the opinion of the court below, which apparently adopts the ruling in the *North American Company* case, is in conflict with the opinion of the Circuit Court of Appeals for the Fourth Circuit in *Burco, Inc.* v. *Whitworth, et al.*, 81 F. (2d) 721 (1936), cert. den. 297 U. S. 724 (1936), which holds that the Act is invalid in so far as it applies to companies which are not engaged in interstate commerce.

4. This Application Is to be Joined in by the Solicitor General.

The Solicitor General's petition for a writ of certiorari in this same proceeding, No. 587, present term, states (p. 18):

"Should respondent request review of the questions of constitutionality and statutory construction decided favorably to the Commission, we shall join in the request, in recognition of the public importance of the issues."

Conclusion.

It is respectfully submitted that a writ of certiorari be granted.

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Appendix.

Section 11(b)(1) of the Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803 (15 U. S. C. A., §79 k (b)(1)) provides as follows:

> (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> (1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—
>
> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> (B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and
>
> (C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) * * * The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.